

1 business. Both Bedavailability.com and A Bed Available allegedly operate websites that
 2 provide information on the availability of accommodations in retirement care facilities, skilled
 3 nursing facilities, and assisted living facilities (collectively, "Care Facilities") in the United
 4 States. Plaintiff alleges Defendants are liable pursuant to the Lanham Act because the
 5 website (including the name and logos) used by A Bed Available is confusingly similar to its
 6 own, and because A Bed Available is allegedly intentionally confusing consumers and
 7 drawing away Bedavailability.com's customers. Plaintiff alleges both Defendants engaged
 8 in the Lanham Act violations. Plaintiff has also brought California state claims, which it
 9 contends arise from the same set of operative facts.

10 **I. Personal Jurisdiction**

11 Defendants characterize the services offered by A Bed Available as listing services
 12 for Care Facilities, and contend the services are to be performed entirely within the state of
 13 Washington. They provide documentation that these agreements are expressly subject to
 14 venue and jurisdiction in Washington and are to be construed under Washington law.
 15 (Paffile Decl. in Supp. of Mot. to Dismiss, ¶ 12.) Defendants add, however, that A Bed
 16 Available "is engaged in the business of helping families and advocates locate a care facility
 17 for a loved one or client." (*Id.* at ¶ 9.) Defendants contend that Defendant Paffile has had
 18 no contacts with the state of California at all for the past fifteen years, and that A Bed
 19 Available has only limited contacts with California.

20 Defendant Paffile's declaration states that each Care Facility pays a fee of \$99 to be
 21 listed on its website, and that the total fees paid by Care Facilities in California amounts to
 22 less than \$2000. (Paffile Decl., ¶¶ 12, 13.)

23 Defendant Paffile declares specifically that its website "is not directed at California
 24 residents.(Paffile Decl., ¶ 11.) A Bed Available "does not direct any of its advertising
 25 specifically toward California residents, nor does it advertise in any publications that are
 26 directed primarily toward California residents." (*Id.*, ¶ 21.)

27 Defendant Paffile has declared that "all of the activities complained of by the Plaintiff
 28 were undertaken by Defendant A Bed Available LLC and/or me in my capacity as a

1 managing member, not as an individual.” (Paffile Decl., ¶ 23.) His declaration further makes
 2 special mention of the precautions he and A Bed Available took to limit fora for litigation
 3 against them to Washington courts. (*Id.*, ¶ 25.)

4 Defendants contend that they were not served in the state of California, are not
 5 domiciled within the state, have not consented to suit in the state, and lack minimum
 6 contacts with the state. Plaintiff does not contest the first three denials, but argues
 7 Defendants do have the required minimum contacts with the state to make them amenable
 8 to suit in California.

9 The parties have cited no federal statute governing personal jurisdiction, so the Court
 10 applies California law. *Panavision Int’l., L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998)
 11 (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993)). In this
 12 case, California’s long-arm statute permits courts to exercise personal jurisdiction to the
 13 extent permitted by the Constitution’s Due Process Clause. Cal. Code Civ. P. § 410.10.

14 “The Due Process Clause protects an individual's liberty interest in not being subject
 15 to the binding judgments of a forum with which he has established no meaningful contacts,
 16 ties, or relations.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (citing *Int’l*
 17 *Shoe Co. v. Washington*, 326 U.S. 310 (1945) (internal quotation marks omitted). Individuals
 18 must have “fair warning” that a particular activity may subject them to the jurisdiction of the
 19 forum state. *Id.* at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)). “[The] ‘fair
 20 warning’ requirement is satisfied if the defendant has ‘purposefully directed’ his activities at
 21 residents of the forum, and the litigation results from alleged injuries that ‘arise out of or
 22 relate to’ those activities. . . .” *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770,
 23 774 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

24 In the internet context, maintenance of a website or internet advertisement alone is
 25 not enough to subject a party to personal jurisdiction in the forum; rather, there must be
 26 “something more” to “indicate that the defendant purposefully (albeit electronically) directed
 27 his activity in a substantial way to the forum state.” *Panavision Int’l*, 141 F.3d at 1321
 28 (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir.1997)). Personal

1 jurisdiction may be based on a the effects of intentional actions expressly aimed at the forum
2 stat and causing harm, the brunt of which is suffered — and which the defendant knows is
3 likely to be suffered — in the forum state. *Id.* at 1321 (citing *Core-Vent*, 11 F.3d at 1486.)
4 The Ninth Circuit has spoken clearly to this issue, holding that, even where a defendant
5 never enters the plaintiff's home state but merely posts material accessible on the internet
6 giving rise to a Lanham Act claim, a district court in the plaintiff's home state has personal
7 jurisdiction over the defendant because infringement would create an injury which would be
8 felt mainly in that state. *Id.* at 1322.

9 Plaintiff has also pointed out that its claims arise out of Defendants' activities
10 specifically aimed at California residents. As noted, Defendants admit they entered into
11 agreements with Care Facilities in California. Given the nature of the services advertised,
12 it is reasonable to infer A Bed Available's website is aimed at California residents who are
13 interested in locating available beds in California Care Facilities. Finally, Plaintiff has
14 submitted evidence showing Defendants directly targeted California residents. Plaintiff has
15 submitted evidence showing that A Bed Available direct mailed individuals in California
16 advertising the website. (Opp'n, Exs. A (electronic mail messages from California residents
17 to Bedavailability.com referencing direct mail), B (example of direct mailed post card to
18 California resident).) Plaintiff has also submitted evidence showing that A Bed Available's
19 website directed users to at least twelve Care Facilities in various cities in California known
20 to have available beds (including Care Facilities in this district), and large numbers of other
21 Care Facilities without known beds available. (*Id.*, Exs. D–F.)

22 Defendants' contentions notwithstanding, it appears Defendants intentionally solicited
23 business from substantial numbers of customers in California. This is sufficient to show, as
24 a threshold matter, that Defendants purposefully directed their activities to California
25 residents, including residents of this district.

26 Defendant Paffile's contention that "[a]ll of the activities complained of by the Plaintiff
27 were undertaken by A Bed Available LLC and/or Mr. Paffile in his capacity as a managing
28 member, and not as an individual," is of no help to him. Plaintiff has alleged that both

1 Defendants committed the infringing acts. A corporate officer or director is “personally liable
2 for all torts which he authorizes or directs or in which he participates, notwithstanding that
3 he acted as an agent of the corporation and not on his own behalf.” *Committee for Idaho's*
4 *High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) (quoting *Transgo, Inc. v. Ajac*
5 *Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1986)) (holding that officers could
6 be personally sued for claims in Lanham Act violations).

7 Defendants’ citation to their agreements’ forum selection clauses in agreements is
8 unavailing, because Plaintiff’s claims do not arise out of these agreements, and Plaintiff in
9 any event is not a party to them.

10 Defendants have also attached a “Terms of use” page from the A Bed Available
11 website requiring that users of the site consent to the arbitration of any disputes in Seattle,
12 Washington, and requiring users to consent to their relationship with A Bed Available to be
13 governed by Washington law. (Paffile Dec., Ex. C.) This has no bearing on the question
14 before the Court, however, as there is no indication Plaintiff has consented to be bound by
15 this provision, and Plaintiff’s claims do not arise out of its use of the website.

16 Because it appears Defendants purposely directed their allegedly infringing activities
17 into California; because Defendants could reasonably anticipate that tortious infringement
18 of Plaintiff’s rights would give rise to a cause of action in Plaintiff’s home forum; and because
19 infringement of Plaintiff’s trademark rights would naturally affect Plaintiff most in its home
20 state, this Court’s exercise of personal jurisdiction over Defendants is reasonable.

21 **II. Defective Service of Process**

22 Defendants’ sole contention in this respect is that Defendant Joseph Paffile was
23 served as Jim Paffile. As noted, Plaintiff filed an amended complaint and served Joseph
24 Paffile anew. The Amended Complaint lists “Joseph Paffile” as a Defendant. The summons
25 is addressed to “Jim Paffile;” the return of service lists “Jim Paffile” as the party, but notes
26 that “Joseph Paffile” is his correct name. Mr. Paffile obviously has received actual notice
27 and knows Plaintiff is attempting to sue him for his actions on behalf of A Bed Available.

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1 Fed. R. Civ. P. 15(c)(3) provides, in pertinent part, that an amendment of a pleading
2 relates back to the date of the original pleading when

3 the amendment changes the party or the naming of the party against whom
4 a claim is within the period provided by Rule 4(m) for service of the summons
5 and complaint, the party to be brought in by amendment (A) has received
6 such notice of the institution of the action that the party will not be prejudiced
in maintaining a defense on the merits, and (B) knew or should have known
that, but for a mistake concerning the identity of the proper party, the action
would have been brought against the party.

7 The Court holds that both conditions (A) and (B) have been met, and that Plaintiff has
8 therefore properly added Defendant Joseph Paffile by amendment. Service on Defendant
9 Paffile, though slightly irregular, is adequate and need not be repeated. *See Campbell v.*
10 *Fernando-Sholes*, 2006 WL 2917353, slip op. at *2 (D.Ariz. 2006) (refusing to quash
11 summons that used slightly incorrect name but that was served on the correct defendant).
12 *See also United Food and Commercial Workers Union, Locals 197, et al. v. Alpha Beta Co.*,
13 736 F.2d 1371, 1382 (9th Cir. 1984) (“Rule 4 is a flexible rule which is liberally construed to
14 uphold service as long as defendant receives sufficient notice of the complaint.”).

15 **III. Failure to State a Claim**

16 Defendants argue that Plaintiff has failed to define what services that infringe
17 Plaintiff’s rights A Bed Available has offered in interstate commerce, Plaintiff has failed to
18 state a claim. Defendants contend Plaintiff has failed to state which services were offered
19 in interstate commerce, and whether A Bed Available or Joseph Paffile allegedly caused the
20 infringement. This argument is based largely on what appears to be a clerical error in the
21 Amended Complaint, at ¶ 27, in which “Infringing Services” is used as a defined term when
22 it has not been previously defined. A drafter’s note to herself to correct this error was
23 apparently left in the Amended Complaint. In view of the previous two paragraphs, which
24 identify the services offered by Plaintiff and A Bed Available as being the same and as being
25 offered on the A Bed Available website, any confusion caused by this clerical error is minor
26 at most. Under notice pleading rules, a simple and obvious clerical error is not an
27 appropriate basis for dismissal. *See Horne v. New England Patriots Football Club, Inc.*, 489
28 F. Supp. 465, 468 n.1 (D.Mass. 1980).

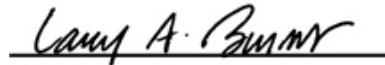
1 The Amended Complaint alleges that both Defendants offered the infringing services
2 for sale in interstate commerce. (Amended Complaint, ¶¶ 12, 14, 15, 26.) Defendants have
3 not shown that this fails to state a claim.

4 **IV. Conclusion and Order**

5 For these reasons, Defendants' Motion is **DENIED**. In view of the correction of Mr.
6 Paffile's name in the Amended Complaint, the Clerk of this Court shall correct the caption
7 in this action to reflect the fact that Mr. Paffile's first name is Joseph.

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9 **IT IS SO ORDERED.**

10 DATED: February 9, 2007

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12 **HONORABLE LARRY ALAN BURNS**
13 United States District Judge
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